

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JS PRODUCTS, INC.,

Plaintiff,

vs.

KABO TOOL COMPANY and CHIH-CHING
HSIEH,

Defendants.

Case No. 2:11-cv-01856-RCJ-GWF

ORDER

Defendant's Memorandum in Support
of Attorneys' Fees and Costs Pursuant
to the Court's Order (#286)

This matter comes before the Court on Defendant Kabo Tool Company's ("Kabo") Memorandum in Support of Attorneys' Fees and Costs (#286), filed on May 16, 2014. Plaintiff JS Products, Inc., ("JSP") filed its Opposition (#313) to Defendants' Motion on June 2, 2014. Plaintiff filed its Reply (#346) on August 13, 2014.

BACKGROUND

On February 26, 2013, Defendant Kabo filed a motion to compel, in which it sought production of a variety of documents and items from JSP, including a copy of the manufacturing drawings or prints for the accused wrenches. *See Dkt. #120*. The Court conducted a hearing on April 2, 2013 during which it indicated that it would order JSP to produce manufacturing drawings based on Mr. Moore's testimony that JSP could obtain them from its supplier. *See Dkt. #154, 202*. Pursuant to the Court's order, JSP produced emails showing that Mr. Moore requested manufacturing drawings from its supplier, Porauto. *See Dkt. #268*, Exhibit 2. On August 2, 2013, JSP's counsel sent a letter to Kabo's attorney enclosing the affidavit of Roger Wiesenauer and a disc containing the purported manufacturing drawings. *See #257*, Exhibit H. Kabo provided the drawings produced by JSP, along with other documents and testimony, to its mechanical

1 engineering expert S. Philip Buckley. *See Dkt. #274* at 4. Mr. Buckley thereafter submitted his
2 expert report dated January 10, 2014 indicating that 82% of the JSP accused wrenches had a
3 thickness of the distal end of the first jaw smaller than a thickness of the distal end of the second
4 jaw. *Id.*; *see also* #259-10, Exhibit J. JSP's expert witness Gene Olson prepared a rebuttal expert
5 report, dated February 11, 2014, stating that the Buckley Report referred to technical drawings,
6 however, the drawings did not contain enough information to determine the dimensions of the
7 wrenches other than those which were actually measured. *See Dkt. #257*, Exhibit K. During his
8 deposition on April 10, 2014, Mr. Olson confirmed his statements that Exhibits K, L, and M to Mr.
9 Buckley's report, which were the drawings that JSP obtained from Porauto in April 2013, were not
10 true manufacturing drawings. *See Dkt. #257*, Exhibit L; *see also Dkt. #270*, Exhibit A. On April
11 11, 2014, Defendant Kabo filed an emergency motion for sanctions alleging that Plaintiff JSP failed
12 to comply with the Court's Order #202.

13 The Court conducted a hearing in this matter on April 25, 2014. *See Dkt. #271*. The
14 undersigned issued an order on May 2, 2014, granting Defendant's motion in part finding that JSP
15 violated the Court's July 3, 2013 order. *See Dkt. #274*. The Court concluded, however, that Kabo
16 was not so prejudiced by JSP's discovery violation as to warrant the severe sanction of entering a
17 judgment for infringement against JSP. *See Dkt. #274*. Instead, the Court granted Defendant Kabo
18 an award of expenses, including attorney's fees. *Id.* Specifically, the order states:

19 Defendant/Counterclaimant Kabo is awarded its reasonable attorney's
20 fees and costs in regard to its motion for sanctions. The Court will
21 also consider an application by Kabo for reimbursement of any
22 expenses such as additional expert witness fees, deposition costs, and
attorney's fees, that are hereafter incurred as a result of JSP's failure
to produce the manufacturing drawings for the accused wrenches as it
represented it did on August 2, 2013.

23 *See Dkt. #274* at 14. The Court further instructed Kabo to serve and file a "memorandum,
24 supported by the affidavit of counsel, establishing the amount of attorney's fees and costs incurred
25 in the motion addressed in this order." *Id.*

26 On May 16, 2014, Defendant Kabo submitted its Memorandum in Support of Reasonable
27 Attorneys' Fees and Costs (#286) requesting \$132,629.48 which includes \$104,682.25 in attorneys'
28 fees, \$1,733.78 in travel costs, \$6,570.00 in expert fees, \$180.00 in deposition fees, \$12,071.00 in

1 fees incurred in preparing Memorandum (#286), and \$7,392.45 in local counsel's fees and costs.
 2 *See Dkt. #286.* Counsel for Defendant Kabo alleged that as a result of JSP's failure to produce the
 3 manufacturing documents and original factory drawings for the accused wrenches, Kabo was forced
 4 to file two motions to compel production and an emergency motion for sanctions (#42, #120, and
 5 #254).

6 In its Response (#313), Plaintiff opposed Defendant Kabo's demand for over \$130,000.00 in
 7 attorney's fees arguing that the amount was unreasonable for a sanctions motion prepared on 24-
 8 hours' notice. Plaintiff further argued that:

9 [t]he Court has already refused to award Kabo the vast majority of
 10 fees included in its demand. This Court specifically awarded Kabo its
 11 'reasonable attorney's fees and costs in regard to its motion for
 12 sanctions' and ordered Kabo to serve and file a memorandum
 13 'establishing the amount of attorney's fees and costs incurred in the
 motion addressed in this order.' [citation omitted] The Court denied
 Kabo's broader requests for terminating sanctions, an adverse
 inference, and additional attorneys' fees and costs for two prior
 motions, depositions, and expert reports."

14 *See Dkt. #313.*

15 In its Reply (#346), Kabo argues that its request for fees and costs is within the scope of the
 16 Court's order, is reasonable and supported, and should not be diminished. *See Dkt. #346.*
 17 Specifically, Defendant Kabo interpreted the Court's language "in regard to" to mean that the grant
 18 of an award concerned those fees and costs outlined in the underlying motion for sanctions.

19 **DISCUSSION**

20 Where the attorneys' fees requested are unreasonably excessive, it is within a court's
 21 discretion to deny fees entirely. *See Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991); *see also*
 22 *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980); *see also First State Ins. Group v.*
 23 *Nationwide Mut. Ins. Co.*, 402 F.3d 43, 44 (1st Cir. 2005) (upholding the district court's decision
 24 declining to award prevailing party any expenses and fees after concluding that the requested
 25 amount, \$89,012.82, was not reasonable for the work involved). In *First State Ins. Group*, the Court
 26 found that a \$60,000 request for compensation of attorneys' fees and approximately \$30,000 request
 27 for local counsel, travel, and other fees was excessive for work performed on an emergency motion,
 28 the ultimate product of which amounted to two memoranda totaling 34 pages in length and

1 attendance and argument at a short hearing. *Id.*

2 The Court agrees with Plaintiff that the amount of fees that Defendant Kabo requests in its
3 Memorandum is excessive and that Defendant Kabo broadly misconstrued the Court's order (#274)
4 awarding reasonable expenses and attorneys' fees. In paragraph 3 of its order, the Court specifically
5 stated that, "[c]ounsel for Kabo shall, no later than 15 days from entry of this order, serve and file a
6 memorandum, supported by the affidavit of counsel, establishing the amount of attorney's fees and
7 costs **incurred in the motion addressed in this order.**" *See Dkt. #274* at 14 ¶ 3. Furthermore, in
8 paragraph 2, the Court specifically indicated that it would consider an application by Kabo for
9 reimbursement of expenses "hereafter incurred" as a result of JSP's failure to produce the
10 manufacturing drawings. *See Dkt. #274*. This established the Court's willingness to review future,
11 incurred expenses caused by Plaintiff's breach. Nowhere did the Court imply, however, that it
12 would revisit previous decisions denying awards of costs or fees. Similar to *First State Ins. Group*,
13 Defendant's request for \$132,629.48 for an 18 page emergency motion for sanctions (#254), a 19
14 page reply (#270) and oral argument at a relatively brief hearing is unreasonably excessive.

15 The Court finds that Defendant Kabo unreasonably expanded the nature of its request for
16 fees, such that JSP was required to file an opposition to the memorandum of costs and fees that
17 would not have been necessary if Defendant Kabo had limited its application to that which was
18 reasonably appropriate. While Defendant Kabo's conduct does not require a complete denial of its
19 application for fees and costs, it does justify a further reduction of the amount to be awarded to
20 Defendant based on its overreaching with respect to its application.

21 The Court reviews Defendant Kabo's fee request solely with regard to the work performed
22 and expenses incurred on its motion for sanctions (#254). The Supreme Court has held that
23 reasonable attorney fees must "be calculated according to the prevailing market rates in the relevant
24 community," considering the fees charged by "lawyers of reasonably comparable skill, experience,
25 and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11, 104 S.Ct. 1541 (1984). Courts
26 typically use a two-step process when determining fee awards. *Fischer v. SJB-P.D. Inc.*, 214 F.3d
27 1115, 1119 (9th Cir. 2000). First, the court must calculate the lodestar amount "by taking the
28 number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly

1 rate.” *Id.* Furthermore, other factors should be taken into consideration such as special skill,
2 experience of counsel, and the results obtained. *Morales v. City of San Rafael*, 96 F.3d 359, 364 n. 9
3 (9th Cir. 1996). “The party seeking an award of fees should submit evidence supporting the hours
4 worked and rates claimed . . . [w]here the documentation of hours is inadequate, the district court
5 may reduce the award accordingly.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Second, the
6 court “may adjust the lodestar, [only on rare and exceptional occasions], upward or downward using
7 a multiplier based on factors not subsumed in the initial calculation of the lodestar.” *Van Gerwen v.*
8 *Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

9 The Court finds that the hourly rates charged by Defendant Kabo’s counsel are reasonable in
10 light of the type of litigation at issue, patent law, and in light of the experience and qualifications of
11 counsel. The hourly rate of \$275.00 per hour for paralegal services, however, is excessive.
12 According to Exhibit A to Defendant’s Memorandum (#286), Defendant’s counsel expended a total
13 of 82.9 hours in attorney time and an additional 7.1 hours in paralegal time in regard to the
14 preparation of the motion for sanctions, reviewing the opposition and preparing a reply. Defendant
15 has not provided the Court with copies of actual itemized billing records, and has instead briefly
16 summarized the expenditure of time. The Court therefore cannot independently verify the actual
17 time billed for tasks related to the motion for sanctions. Given the content of the briefs and their
18 length, however, the Court finds that this number of hours is excessive on its face.

19 The Court finds that the reasonable attorney and paralegal time associated with Defendant
20 Kabo’s motion for sanctions does not exceed 40 hours total. Using a reasonable composite hourly
21 rate of \$400.00, results in a total fees of \$16,000.00. Because Defendant Kabo unreasonably sought
22 to recover much higher fees for legal services unrelated to the motion for sanctions, and which are
23 also not supported by adequate billing records, the Court exercises its discretion to reduce the award
24 of attorneys’ fees and costs to Defendant Kabo by one-third. The Court therefore awards Defendant
25 Kabo attorneys’ fees and costs related to its motion for sanctions in the total amount of \$10,667.00.
26 Accordingly,

27 **IT IS HEREBY ORDERED** that Defendant Kabo Tool Company’s (“Kabo”) Application
28 and Memorandum in Support of Attorneys’ Fees and Costs (#286) is **granted** as follows:

2. Because Plaintiff JS Products, Inc. has filed a Motion for Attorneys Fees and Expenses (#377), as the prevailing party in this action, the payment of the foregoing award of fees and costs to Defendant Kabo Tool Company is stayed pending a decision on JS Products, Inc.'s motion for fees and expenses. If JS Products is awarded fees and costs on its motion, then the foregoing amount awarded to Defendant Kabo Tool Company may be offset against such award.

8 DATED this 15th day of October, 2014.

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GEORGE FOLEY, JR.
United States Magistrate Judge